Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

J.L. HOLLIS,

Petitioner,

v.

PROVIDENT LIFE AND ACCIDENT INS. CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the ruling below, that independent contractors are subject to ERISA as "beneficiaries" of a welfare benefits plan, and hence cannot maintain state law claims resulting from the denial of benefits, consistent with this Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992)?

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PROVIDENT LIFE AND ACCIDENT INS. CO.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J . L. HOLLIS, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

The district court's opinion (per Barbour, D.J.) denying respondent's summary judgment motion (Appendix ("Pet. App.") 2a - 20a) is not published. The Court of Appeal's opinion (per Reynaldo G. Garza, joined by Davis and Jones, JJ.) reversing (Pet. App. 22a - 33a) is published at 259 F.3d 410. The Court of Appeals' order denying rehearing and rehearing en banc (Pet. App. 34a) is not otherwise published.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Order and Opinion August 8, 2001, and denied rehearing and rehearing en banc on October 25, 2001.

Petitioner invokes jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974, 29 U.S.C.A. § 1001 et seq., are as follows:

29 USCA § 1002(1)

> For purposes of this subchapter:
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 USCA § 1002(8)

> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1001(a)

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial;

> that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; * * * it is desirable in the interests of employees and their beneficiaries * * *.

29 U.S.C. § 1001(b)

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries * * *.

STATEMENT OF THE CASE

J. L. [Larry] Hollis began work as a salesman employee for Graduate Supply House [Graduate Supply] on July 1, 1970. His duties included selling and delivering graduation caps & gowns, boxes of diplomas, yearbook covers, class mugs and other graduation supplies. Pursuant to an agreement between him and Graduate Supply, which he entered into in August of 1981, Hollis assumed certain responsibilities and duties and became an independent contractor. During the course of litigation of this case, in an attempt to have the state-law claims alleged by Hollis preempted by ERISA, Provident challenged his status as an independent contractor by motion for summary judgment. The district court denied Provident's motion, finding that Hollis was an independent contractor. Provident did not challenge the court's finding on appeal and his status as an independent contractor is not an issue in this petition.

In 1986, Graduate Supply arranged for its salesman employees to obtain disability benefits from Lincoln Life Insurance Company [Lincoln Life]. Hollis did not participate

in the Graduate Supply program, but purchased his own disability insurance policy from a different insurance company, Provident Life and Accident Insurance Company [Provident] at a later date. Graduate Supply had been paying a small portion of the premiums of the Lincoln Life policies owned by its employees, and when Hollis obtained his disability insurance from Provident, Graduate Supply paid the same amount on his premiums. Hollis also purchased additional disability insurance from Paul Revere Insurance Group, which was wholly owned by Provident on the day of trial.

Hollis became disabled under the terms of his policies, and finally resigned from Graduate Supply on August 17, 1995. He subsequently filed disability claims on both policies and both companies began paying monthly benefits.

Two years after the benefit payments began, a new adjuster started handling Hollis' Provident disability payments. After noticing that his disability forms were typed, she wrote Hollis to let him know that he would have to start having his attending physician fill out his monthly claim forms by hand, and that the typed forms he had been submitting would no longer be acceptable. In a subsequent telephone conversation, an argument ensued because of the severe inconvenience the adjuster intended to cause Hollis and his doctor, and as soon as the adjuster hung up the phone, she initiated surveillance on Hollis. Subsequently, she arranged for an independent medical examination, and armed with a de minimus amount of trumped-up evidence, she terminated his disability benefits. After learning that Provident had terminated Hollis' benefits, Paul Revere, which was a wholly-owned subsidiary of Provident at that time, also terminated his benefits.

On April 2, 1998, Larry Hollis filed suit in the Circuit Court of Hinds County. The defendants removed to the United States District Court for the Southern District of Mississippi, Jackson Division. Provident subsequently filed a

motion for summary judgment on the grounds that Hollis' state law claims against it were pre-empted by ERISA. On May 7, 1999, the District Court issued an Opinion and Order finding that Hollis was an independent contractor and that therefore, his claims were not pre-empted by ERISA.

The case was tried to a jury which found that Provident had acted in bad faith in terminating Hollis' disability benefits. On May 28, 1999, The jury returned a verdict awarding Hollis policy benefits for total disability and damages of $100,000 on the bad faith claim against Provident, but returned a defense verdict for Paul Revere.

Hollis timely filed an appeal in the Fifth Circuit Court of Appeals contesting the defense verdict for Paul Revere on the grounds that the policies of the two companies were virtually identical and that the verdicts were therefore inconsistent. He also appealed a post-trial ruling of the district court denying attorney's fees. Provident filed a cross-appeal as to the District Court's ruling that Hollis' claim was not pre-empted by ERISA and on other matters. The only issue addressed in this petition is whether Hollis' state law claims were preempted by ERISA.

On August 8, 2001, the United States Court of Appeals for the Fifth Circuit reversed the decision of the district court denying Provident's motion for summary judgment. The Court ruled that Hollis' state law claims concerned his right to receive benefits under an ERISA plan and that they directly affected the relationship between traditional ERISA entitles. (Pet. App. 27a). In holding that Hollis received benefits under an ERISA plan, the Court noted that Hollis clearly claimed a right to benefits under his Provident disability policy, but that fact alone was insufficient for preemption, and that the plan under which he claimed benefits must be an ERISA plan for preemption to occur. *Id.* Since there was no argument that, in so far as those policies owned by the employees were concerned, an ERISA plan existed, the Court reasoned that the real issue was whether Hollis' disability policy with Provident was part the Graduate Supply ERISA plan. The

Court ruled that because Graduate Supply paid the same portion of Hollis' insurance policy that it paid for its employees, that Hollis' policy was part of Graduate Supply's ERISA plan. *Id. at 28a.*

Having held Hollis' policy part of the Graduate Supply ERISA plan, the Court then stated that in order for preemption to occur, Hollis must either be a plan "participant" or a "beneficiary." *Id. at 29a.* Noting that not even Provident claimed Hollis was a "participant," the Court moved on to consideration of whether he was a "beneficiary." *Id.* Although he was the only insured on his own insurance policy, was not a plan participant, and no plan participant was an insured of provident, the Court nevertheless held that he was a beneficiary of the plan and that his state-law claims were preempted.

Feeling aggrieved with the Court's decision, Plaintiff filed a Petition for Rehearing and for Rehearing en Banc on the grounds that the decision of the Fifth Circuit Panel was in irreconcilable conflict with several other federal circuits and with a decision of the United States Supreme Court since it held an independent contractor subject to ERISA even though he was not an employee, employer or a participant

in an ERISA plan. The Court subsequently issued an Order summarily denying the petitions on October 25, 2001.

REASON FOR GRANTING THE WRIT

I. RULING OF THE FIFTH CIRCUIT IN THIS CASE MEANS THAT EVERY INDEPENDENT CONTRACTOR WHO RECEIVES BENEFITS UNDER A SEPARATE INDIVIDUAL INSURANCE POLICY WHICH IS RELATED TO A SEPARATE WELFARE BENEFIT PLAN COVERED BY ERISA IS A PLAN "BENEFICIARY" UNDER ERISA AND THEREFORE CANNOT BRING STATE LAW CLAIMS ARISING FROM THE DENIAL OF BENEFITS. THIS UNDERMINES, IF NOT DEPRIVES OF ALL PRACTICAL EFFECT, THIS COURT'S

DECISION IN *NATIONWIDE MUTUAL INS. CO. V. DARDEN*, 503 U. S. 318 (1992), BY PERMITTING THE VERY NON-EMPLOYEES *DARDEN* HELD COULD NOT SUE UNDER ERISA TO DO SO AS PLAN "BENEFICIARIES." AS WILL BE NOTED, THERE IS A CONFLICT IN THE CIRCUITS ON THE ISSUE, AND WHETHER THIS EVISCERATION OF *DARDEN* SHOULD BE ALLOWED IS AN ISSUE OF WIDE IMPORTANCE UNDER ERISA.

A. The Holding of the Fifth Circuit in *Hollis v. Provident Life and Acci. Ins. Co.*, et al., 259 F.3d 410 (5th Cir. 2001) that an Independent Contractor May Be Subject to ERISA, Directly Conflicts with the Unanimous Opinion of the United States Supreme Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344 117 L.Ed.2d 581 (1992).

Recognizing that Larry Hollis was an independent contractor and not an employee, the Fifth Circuit correctly held that he could not be a participant in an ERISA plan. The Court then failed to properly consider established and binding precedent from the United States Supreme Court and the published decisions of other Federal Circuit Courts of Appeal and ruled that since Hollis was a beneficiary of his own separate insurance policy, which the Court deemed part of an ERISA plan, then he was also a beneficiary for ERISA purposes and subject to the Act. In *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344 117, L.Ed.2d 581(1992), this Court specifically ruled that independent contractors are not covered by ERISA.

In *Darden* the plaintiff was enrolled in a company retirement plan for agents of Nationwide. *Darden*, 503 U.S. at 320. Under one of the contracts between them, Darden agreed that if he was terminated by Nationwide, he would nevertheless continue to sell only Nationwide policies the following year. *Id.* Nationwide subsequently terminated

Darden and he began selling insurance for competitors of Nationwide prior to the expiration of the one year time period agreed upon. *Id.* Nationwide responded by cutting off his retirement plan benefits, claiming that he had breached the contract. *Id.* Darden then sued Nationwide under ERISA *specifically to collect benefits because he was a beneficiary of the retirement benefit plan. Id.* The District Court Held that Darden could not sue under ERISA because he was an independent contractor. *Id.* at 321. On appeal to the Fourth Circuit, the Court held that he was an employee for ERISA purposes because he had a reasonable expectation that he would receive benefits, that he relied on the expectation, and that he lacked the economic bargaining power to contract out of the benefit plan forfeiture provision. *Id.* The United States Supreme Court disagreed, noting that "* * * *Darden's ERISA claim can succeed only if he was Nationwide's 'employee,'* * * *. Id.* at 320 (emphasis added).

In the instant case, the Fifth Circuit noted that even when the plan is an ERISA plan, claims such as those of Hollis are preempted only when the claimant is a plan "participant" or "beneficiary," and even Provident did not assert that Hollis was a participant. (Pet. App. 28a). The court then determined that since Hollis was a beneficiary of his own insurance policy, which the court had deemed part of the Graduate Supply ERISA plan, then his state law claims were preempted by ERISA. *Id.* This finding directly conflicts with the holding of the United States Supreme Court in *Darden.*

B. The Holding of the Fifth Circuit in the Instant Case Conflicts the Holdings of the United States Courts of Appeal for the Ninth Circuit, First Circuit, and Sixth Circuit.

In *Barnhart v. New York Life Ins. Co.*, 141 F.3d 1310 (9th Cir. 1998), the Ninth Circuit, relying on *Darden*, dismissed

a claim by an insurance agent who tried to invoke ERISA. The District Court held that, "Because he was an independent contractor, he could not bring the claim under ERISA." *Id.* The United States Court of Appeals for the Ninth Circuit confirmed, holding that to be covered by ERISA, he had to be an "employee." *Id.* at 1312. Again, the Ninth Circuit held as it did even though Barnhart was clearly entitled to benefits under his health plan. *See Id.*

In *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 628, 634 (1st Cir. 1996), Speen, a salesman, brought an ERISA claim and an ADEA claim against his employer alleging wrongful termination. Relying on the definition of "employee" found in *Darden, supra*, the Court found that Speen was not an employee, and therefore, his "ERISA claim failed for a lack of standing." *Speen*, 102 F.3d at 634. Two years later, in 1998, the First Circuit decided the case of *Dykes v. Depuy, Inc.*, 140 F.3d 31, 37 (1st Cir. 1998), holding a sales representative's claims of ERISA coverage "stand or fall on whether he was an independent contractor," *Id.*, again *citing Darden, supra*, for the proposition that "ERISA does not reach independent contractors." *Id.*

In *Wolcott v. National Mutual Ins. Co.*, 884 F.2d 245, 250-251 (6th Cir. 1998), the Sixth Circuit held that an independent contractor insurance agent was not covered by ERISA, which is applicable "only if: (1) Wolcott is Nationwide's 'employee' within the meaning of ERISA." All appellate cases to date are unanimously in accord with *Darden* – ERISA does not cover independent contractors.

While the Circuits have split on cases extending ERISA coverage to business owners[1] all of the appellate cases

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[1]Peterson has been followed as to business owners by three other Circuits, *see Prudential Ins. Co. v. Doe*, 76 F.3d 206, 209 (8th Cir. 1996); *Englehardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1351 (11th Cir. 1998); *Wolk v. Unum Life Ins. Co. of America*, 186 F.3d 352 (3d Cir. 1999), *cert. denied*, 120 S.Ct. 792 (2000). The position of the First, Sixth, and Seventh Circuits is to the contrary, *see Kwatcher v. Massachusetts Service Employees Pension Plan*, 879 F.2d 957, 959-60 (1st Cir. 1989); *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000); *Fugarino v. Hartford Life and*

deny ERISA coverage to independent contractors.

C. Congress Intended That ERISA Pre-emption Apply Only to Participants and Their Beneficiaries.

Noting that "ERISA defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder," (Pet. App. at 28a), *citing* 29 U.S.C. § 1002(8), the Fifth Circuit held that Hollis was an ERISA beneficiary because his individual policy was part of Graduate Supply's ERISA plan and he was the beneficiary of his policy. This broad interpretation of the definition of "beneficiary" could only be arrived at by construing the statutory definition in isolation. When one considers the Act as a whole, it is clear that the only "beneficiaries" intended by the Act are beneficiaries of the participants, whether the participants specifically designate them, or whether the provisions of the plan designate them. The definition does not refer to persons who are not connected to the plan through a participant.

Many provisions of the Act refer specifically to "participants and *their beneficiaries.*" The "General Provisions" section of the Act provides:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of *millions of employees and their dependents* are directly affected by these plans; * * *it is desirable in the interests of *employees and their beneficiaries* * * *.

29 U.S.C. § 1001(a)(emphasis added).

Acci. Ins. Co., 969 F.2d 178, 185-86 (6th Cir. 1999), *cert. denied*, 506 U.S. 893 (1993); *Giardono v. Jones*, 867 F.2d 409 (7th Cir. 1989).

In specifying the reason for passing the Act, Congress noted:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of *participants* in employee benefit plans *and their beneficiaries*, by requiring the disclosure and reporting to participants and beneficiaries * * *.

29 U.S.C. § 1001(b)(emphasis added).

Even in defining a "welfare benefit plan," the statute clearly shows that the term "beneficiary" is expressed in reference to some "participant" of a plan:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for *its participants or their beneficiaries* * * * benefits * * *.

29 U.S.C. § 1002(1)(emphasis added).

All of these sections of the Act support the statement in the Fourth Circuit's first opinion in *Darden*, that "beneficiaries" are limited to persons whose entitlement to benefits derives from the rights of some "participant" in the plan. *Darden v. Nationwide Mut. Ins. Co*, 796 F.2d 701, 704 n. 3 (4th Cir. 1985), *on remand*, 717 F.Supp. 388 (E.D.N.C.1989), *aff'd*, 922 F.2d 203 (4th Cir.1991), *rev'd on other grounds*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

These sections are also consistent with the definition

of "beneficiary" found in 29 U.S.C. § 1002(8), which should be read in conjunction with the other sections referring to participants or *their* beneficiaries to mean that either the participant or the plan can define which persons derive their rights from the participant. That is, the plan might either leave it to the participant to specify his own beneficiaries, or itself provide that, for example, spouses and minor children of participants are covered.

The Fifth Circuit agreed that Larry Hollis could not be a "Participant" of the plan because he was an independent contractor; therefore, his own disability policy did not include any participant of the plan. The disability policies owned by the employees, who were the only participants of the plan, did not designate Hollis as a beneficiary. Since Hollis was not designated a beneficiary by a participant or by any of the other employee policies which insured a plan participant, he was not a beneficiary for ERISA purposes.

Under the Fifth's Circuit's ruling In this case, Graduate Supply had the power to either make Hollis, a non-employee, part of the Graduate Supply ERISA plan, or to deny him benefits under the plan, simply by paying or not paying a portion of his premium. Employers should not have the power to diminish state law rights of persons who are not ERISA entities by choice of the form of the plan. *C. F., Employee Staffing Services v. Aubry*, 20 F.3d 1038 (9th Cir. 1994); *Hook v. Morrison Milling Co.*, 38 F.3d 776 (5th Cir. 1994)("ERISA was not active to allow employers to control which laws or claims are preemptive and those which are not").

In *Darden* this Court held that non-employees could not sue under ERISA. *Darden*, 503 U.S. at 320. Permitting these same non-employee independent contractors to sue as "beneficiaries" of a plan in which they cannot participate or receive benefits through a participant frustrates the intention of this Court in *Darden*. There is a conflict in the Circuits on the issue, and whether this evisceration of *Darden* should be allowed is an issue of wide importance under ERISA.

CONCLUSION

For the foregoing reasons, your Petitioner respectfully prays that this petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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1. Opinion and Order dated May 7, 1999, of the United States District Court of the Southern District of Mississippi denying Summary Judgment for the Respondent.....2a

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4. Order of the Court of Appeals for the Fifth Circuit dated October 25, 2001, denying Petition for Rehearing filed by Petitioner herein.....34a

1. **OPINION AND ORDER DATED MAY 7, 1999, OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF MISSISSIPPI DENYING SUMMARY JUDGMENT FOR THE RESPONDENT**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J. L. HOLLIS — PLAINTIFF

VERSUS — CAUSE NO. 3:98cv341BN

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY AND THE PAUL REVERE INSURANCE COMPANY — DEFENDANTS

OPINION AND ORDER

This cause is before the Court on Defendants' Motion for Partial Summary Judgment. Having considered the Motion, Response, Rebuttal, supporting and opposing authority, and all attachments to each, the Court finds the Motion is not well taken and should be denied.

I. Factual Background and Procedural History

This case involves a claim for bad faith denial of benefits under two disability policies. Plaintiff Larry Hollis began work with R.M. Hendrick Graduate Supply House, Inc. ("Graduate Supply") as a salesman in Jackson, Mississippi in 1970. Graduate Supply sells or otherwise provides class rings, diplomas, caps and gowns, graduation invitations, yearbooks, t-shirts, projectors, sound equipment, commercial awards, and related school items to high schools and colleges.

As a sales representative for Graduate Supply, Hollis's

duties included loading his cars with boxes of class rings, cases, displays, sales materials, and other above-listed items sold by Graduate Supply, driving long distances to high schools and colleges all over Mississippi, and unloading the boxes and items from his car to display and deliver. Graduate Supply had contracts with the schools Hollis visited, and these contracts were renewed on a yearly basis. Each Graduate Supply salesman, including Hollis, was assigned to certain schools or territories which he was responsible for contacting during the school year. In addition, Hollis serviced certain commercial accounts on behalf of Graduate Supply and provided them with corporate recognition items.

The parties dispute whether Hollis was an employee of Graduate Supply or an independent contractor. Hollis contends that he was an independent contractor. He claims that until August 1, 1981, he was a salesman employee but his status as employee ended on that date pursuant to an agreement between him and Graduate Supply which provided that, henceforth, he would be a self-employed person. The agreement provided:

1. The Principal does hereby engage the Sales Representative to sell its line of merchandise.

2. The Sales Representative shall have a territory as specified by the Principal.

3. The Sales Representative shall furnish an automobile to enable him to travel throughout his territory and shall pay all costs of its upkeep and operation.

4. The Sales Representative shall pay all his traveling expense.

5. The Principal shall pay the Sales Representative a commission as agreed upon by both parties.

6. The Sales Representative shall be responsible for paying all his self-employment and income taxes.

See Affidavit of J.L. Hollis, Exhibit "A" to Response to Motion for Partial Summary Judgment.

Hollis paid his federal income tax as an independent contractor under Form 1099, the form used for wages of an independent contractor or self-employed individual. Hollis also participated in a Keough Plan as a self-insured person.

Defendants contend that Hollis was an employee, not an independent contractor. They emphasize that Hollis was a salesman for Graduate Supply and worked solely for Graduate Supply. Hollis called only on customers of Graduate Supply, his sales territory was specified by Graduate Supply, he signed documents on behalf of Graduate Supply, and he performed the same duties throughout the course of his 25 year relationship with Graduate Supply. In addition, his duties and responsibilities did not differ from the duties and responsibilities of the employee sales representatives of the company, he shared in year end bonuses just like other employees, and Graduate Supply was his primary, if not sole, source of income.

Defendants assert that Graduate Supply had a program to provide life, medical, and disability insurance for its employees and salesmen, including Hollis. When the program was established, Graduate Supply contacted Prince & O'Quin, an insurance agency in Alexandria, Louisiana, and made arrangements for their agents to meet with salesmen of Graduate Supply to discuss obtaining individual disability insurance policies. Graduate Supply paid $600.00 per year, or $50.00 per month, of the premium for each salesman's disability insurance premium. Graduate Supply approved and recommended Prince & O'Quin to its salesmen, but the company allowed each salesman to decide how much disability

insurance, if any, he wanted to obtain. Some salesmen obtained only what could be purchased with the premium paid by Graduate Supply, and others applied for more coverage. If a salesman purchased a policy that cost more than $50.00 per month, Graduate Supply would pay the entire premium when it became due and then deduct the amount not charged to the company from the salesman's monthly compensation. All of the salesmen's policies were billed directly to Graduate Supply and paid by Graduate Supply as they became due. This was the way in which Hollis's premiums were handled.

Defendants claim that Graduate Supply made the arrangements for Prince & O'Quin to meet with its salesmen and paid these disability insurance premiums for its salesmen as a benefit of the salesmen's employment at Graduate Supply and for the purpose of providing them benefits in the event of disability. In addition to paying the periodic premiums, Graduate Supply has continued to contact Prince & O'Quin when new salesmen are hired and to make arrangements for these salesmen to obtain disability insurance. The agent meets with these new salesmen at the office of Graduate Supply or at some other convenient location. The salesman decides how much disability insurance he wants to purchase, and the bill is sent to Graduate Supply. Graduate Supply pays its share of the premium and the balance is charged to the salesman.

Most of the salesmen obtain disability insurance from Lincoln National Life Insurance Company. However, when Hollis submitted his application to Lincoln, that company declined to issue him the coverage he wanted. Therefore, on or about February 3, 1986, Hollis met with Greg O'Quin and submitted an application for a disability insurance policy from Defendant Provident Life and Accident Insurance Company ("Provident"). His application indicated that his employer would pay $50.00 per month of the premium. The application, as submitted, requested whatever amount of insurance that $50.00 per month would buy. This amount was subsequently increased to provide a monthly benefit of $4,100.00 with a

quarterly premium of $505.00. Hollis's application was approved and the policy was issued on or about March 10, 1986. As specified in the application, Graduate Supply paid a quarterly premium of $150.00, and the balance was charged to Hollis.

In addition to the Provident policy, Hollis applied for another disability policy with Defendant Paul Revere Insurance Company ("Paul Revere") in February 1993. The application was accepted, and on February 26, 1993, Paul Revere issued its Policy Number 0102603069 to Hollis. Both policies contain similar disability provisions. Under the Provident policy, "total disability" means that "due to Injury or Sickness" the insured is "not able to perform the substantial and material duties of [his] occupation;" and he is "under the care and attendance of a Physician " In addition, the Provident policy provides for Residual Disability benefits:

> Residual Disability means that due to Injuries or Sickness:
>
> 1. you are not able to do one or more of your substantial and material daily business duties or you are not able to do your usual daily business duties for as much time as it would normally take you to do them;
>
> 2. you have a Loss of Monthly Income of at least 20%; and
>
> 3. you are under the care and attendance of a Physician.

Under the Paul Revere policy. "total disability" means that "because of Injury or Sickness" the insured is "unable to

perform the important duties of [his] Occupation;" and that he is receiving Physician's Care." The Paul Revere policy also provides for Residual Benefits as follows:

> "Residual Disability," prior- to the Commencement Date, means that due to Injury or Sickness which begins prior to age 65:
>
> a. (1) You are unable to perform one or more of the important duties of Your Occupation; or
>
> (2) You are unable to perform the important duties of Your Occupation for more than 80% of the time normally required to perform them; and
>
> b. You are receiving Physician's Care. We will waive this requirement if We receive written proof acceptable to Us that further care would be of no benefit to You; and
>
> c. You are not Totally Disabled.

In August 1995, Hollis resigned from Graduate Supply. According to Hollis, he resigned because of longstanding medical problems with his back and spine which had been diagnosed by his physician, Dr. Lynn Stringer, as advanced degenerative disk disease. Dr. Stringer had told Hollis that the driving, bending, stooping, lifting, and twisting that Hollis did in his job as a sales representative for Graduate Supply had caused his back to become symptomatic and excruciatingly painful. Hollis alleges that his work was causing him constant

pain, and that he resigned because he realized he could no longer continue to do his job.

On August 23, 1995, Hollis submitted claims to Provident and Paul Revere for total disability benefits. Both claims were evaluated by the insurers, and Hollis subsequently began to receive disability payments from Provident ($4,100.00 per month) and from Paul Revere ($2,100.00 per month)

Upon receipt of his claim, Paul Revere initially investigated whether Hollis's claim was covered under its policy. Paul Revere secured copies of Hollis's medical records.

Provident also obtained copies of the medical records. In addition, Provident had one of its representatives prepare a field report involving a personal meeting with Hollis and a teleconference with Hollis's employer regarding Hollis's job duties.

In early 1997, Provident acquired Paul Revere. Hollis's claim file was transferred to a different claim representative, Sally Moore. Moore reviewed Hollis's file and had some questions about some typed attending physician statements about Hollis's condition that had been submitted to Provident. Moore wrote to Hollis and informed him that Provident would no longer be able to accept the attending physician's statement in typed form. Hollis then called Moore and admitted that he had typed the attending statements and taken them to the doctor to sign. Defendants contend that Hollis "very aggressively" informed Moore that his doctors were fed up with completing the forms and that he intended to continue to assist them by typing the forms.

Moore then decided to initiate surveillance of Hollis's daily activities. The surveillance revealed Hollis doing yard work at his home. Claims personnel at Provident reviewed Hollis's medical records and had Hollis undergo an independent medical examination. In addition, a Provident

representative contacted Hollis's former employer at Graduate Supply to discuss Hollis's duties as a salesman and specifically, the lifting requirements of Hollis's job.

Based on the surveillance, the independent medical examination, and the discussion with the representative of Graduate Supply, both Provident and Paul Revere came to the conclusion that Hollis's back condition did not meet the definition of "total disability" in the respective insurance policies and both insurers informed him that they would be unable to provide further total disability benefits to him at this time. Provident and Paul Revere invited Hollis to submit a claim for residual disability, but Hollis has not done so.

Hollis filed a Complaint against Provident and Paul Revere in the Circuit Court of the First Judicial District of Hinds County alleging that these companies are liable to him for bad faith denial of insurance benefits. This case was subsequently removed to this Court. Defendants filed the present Motion for Partial Summary Judgment arguing that Hollis's claims against Provident are governed by ERISA, which preempts all state law remedies arising out of an insurer's handling of a claim for benefits under an employee welfare benefit plan, including Hollis's claims of bad faith under Mississippi law. For this reason, Defendants argue that Hollis's claim for punitive and other extra contractual damages against Provident should be dismissed. In the alternative, Defendants argue that even under Mississippi law, Hollis is not entitled to punitive damages or other extra contractual damages against Provident or Paul Revere under the facts of this case.

Hollis responded to the Motion for Partial Summary Judgment contending that he was an independent contractor, as opposed to an employee of Graduate Supply, and for this reason, ERISA does not apply to his claims against Defendant. In the alternative, Hollis argues that even if he were an employee of Graduate Supply, the Provident policy does not satisfy the elements of an Employee Welfare Benefit Plan

sheltered by ERISA because Graduate Supply did not procure the policy for Hollis but he himself arranged for the purchase of the Provident policy a year after he did not join the group policy through Lincoln National. With regard to his common law claims for punitive damages for bad faith denial of benefits, Hollis argues that there are questions of material fact regarding whether there was an arguable reason for Defendants to terminate his claim for disability benefits, and for this reason, summary judgment is inappropriate.

II. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317. 322 (1986) ; see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an

absence of evidence to support the non-moving party's claim. Id. at 323-324. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue :or trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, * * * since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980) . Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange. Inc., 305 F.2d 647, 651 (5th Cir. 1962)

III. Analysis

A. ERISA Preemption

1. Is the disability policy an ERISA plan?

The Employee Retirement Income Security Act of 1974 ("ERISA") was passed "to protect interstate commerce and the interests of participants in employee benefit plans and their - beneficiaries * * * ." 29 U.S.C. § 1001(b). A plan qualifies as an ERISA plan under a three step test:

> [W]e ask whether a plan: (1) exists; (2) falls within the safe-harbor provision established by the Department of Labor; and (3) satisfies the primary elements of an ERISA "employee benefit plan". .

Meredith v. Time Ins. Co., 980 F.2d 352, 355 (5th Cir. 1993). Two types of employee benefit plans are governed by ERISA: "employee welfare benefit plans" and "employee pension

benefit plans." Salameh v. Provident Life & Accident Ins. Co., 23 F.Supp.2d 704, 709 (S.D.Tex. 1998) . See Weaver v. Employers Underwriters, Inc., 13 F.3d 172, 175 (5th Cir. 1994), cert. denied, 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed.2d 866 (1994) (citing 29 U.S.C. 5 1002(3)). An "employee welfare benefit plan" is defined as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits .

29 U.S.C. § 1002(1).

At the outset, a court confronted with the question of whether a particular arrangement constitutes an employee welfare benefit plan under ERISA "must first satisfy itself that there is in fact a plan at all." Meredith, 980 F.2d at 355. (citing MDPhysicians & Assocs., Inc. v. State Bd. of Ins., 957 F.2d 178, 183 (5th Cir.), cert. denied, 506 U.S. 861, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992)). In determining whether a plan "exists," a court must determine "whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." Meredith, 980 F.2d at 355.

In this case, the Court finds that an ERISA plan existed. The provision of disability insurance to the sales representatives by Graduate Supply was and is part of an overall design of employee benefits, which constitutes an

ERISA plan. A reasonable person could ascertain the intended benefits (the disability insurance benefits set forth in the policies issued to the sales representatives) , the source of financing, (the premiums paid by Graduate Supply) and procedure for receiving benefits (the procedures for submitting a claim as set forth in the policies).

Under the second prong of the ERISA qualification test, in order to be covered under ERISA, a plan must not fall within the safe-harbor provision promulgated by the Department of Labor. See Meredith, 980 F.2d at 355; Gahn v. Allstate Life Ins. Co., 926 F.2d 1449, 1452 (5th Cir.1991).

A plan is exempted from coverage under ERISA plan if: (1) the employer does not contribute to the plan; (2) participation is voluntary; (3) the employer's role is limited to collecting premiums and remitting them to the insurer; and (4) the employer receives no profit from the plan. See 29 C.F.R. § 2510.3-1(j) (1)-(4) (1992); Meredith, 980 F.2d at 355. In this case, Graduate Supply paid, as an expense to the company, $600.00 of the annual premium of the disability policies. The fact that the employer pays some or all of the costs of a plan generally means that the plan is governed by ERISA. See Kidder v. H&B Marine, Inc., 932 F.2d 347, 352-53 (5th Cir. 1991) (noting that while bare purchase of insurance policy may not exclusively establish existence of an ERISA plan, evidence revealed intent of company to provide its employees with welfare benefit program through purchase and maintenance of group insurance policy); Salameh, 23 F.Supp.2d at 710 (where physicians partnership paid premiums for life insurance covering its physicians and staff as well as its physicians' medical, health, and disability insurance, safe-harbor provision did not apply, and plan was not exempted from ERISA).

Finally, under the third prong, the court examines the two primary elements of an ERISA "employee welfare benefit

plan" as defined by the statute: (1) whether an employer established or maintained the plan; and (2) whether the employer intended to provide benefits to its employees. MDPhysicians, 957 F.2d at 183) . However, the court, "cannot answer either question without first considering the bounds of the terms 'employer' and employee' ". Id. at 355-56 (citations omitted). "An essential element of an ERISA employee welfare benefit plan is the 'establishment or maintenance of a plan by an employer intending to benefit employees.' " Vega v. National Life Ins. Servs. Inc., 145 F.3d 673, 676 (5th Cir. 1998) (quoting Meredith, 980 F.2d at 355) . "[Mn employee benefit plan necessarily must center on the existence of an employer and an employee." Meredith, 980 F.2d at 354. ERISA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). A plan in which one or more common law employees, in addition to self-employed individuals, are participants, is covered by ERISA. Salameh, 23 F.Supp.2d at 710.

In this case, Graduate Supply established a program to provide its sales representatives disability insurance protection. Graduate Supply facilitated meetings between the sales representatives and an insurance agent, it contributed a portion of the cost of the insurance, and, by paying the premiums as the became due, the company performed administrative functions to keep the coverage in effect. Graduate Supply clearly evidenced its intent to provide disability benefits to its employees. Regardless of whether the Court finds that Hollis was an independent contractor as opposed to an employee, the plan covered other sales representatives who were employees of Graduate Supply, and thus, the plan was covered by ERISA.

2. Are Hollis's claims against Provident preempted by ERISA?

The Fifth Circuit has noted that the existence of an ERISA plan does not mean that there must necessarily be ERISA preemption. Weaver, 13 F.3d at 176 n.9. The preemption

clause in ERISA states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." Id. (citing 29 U.S.C. § 1144(a)). Any state law causes of action are barred by § 1144(a) if

> (1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an
>
> ERISA plan; and (2) the claims directly affect the relationship between the traditional ERISA entities–the employer, the plan and its fiduciaries, and the participants and beneficiaries.

Weaver, 13 F.3d at 176 (citing Memorial Hosp. System v. Northbrook Life Ins. Co., 904 F.2d 236, 245 (5th Cir.1990))

In Weaver, the Fifth Circuit held that the claims of an independent contractor do not directly affect the relationship between the traditional ERISA entities–the employer, the plan and its fiduciaries, and the participants and beneficiaries. Weaver, 13 F.3d at 176. In reaching this conclusion, the court noted that ERISA defines "participant" as

> any employee or former employee of an employer, or any member of former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Id. (citing 29 U.S.C. § 1002(7)). The court explained that since the plaintiff was an independent contractor and not an employee, the plaintiff was not an ERISA "participant." Id.

In addition, the court noted that the plaintiff was not an ERISA "beneficiary." Id. ERISA defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." Id. at 176-77 (citing 29 U.S.C. § 1002(8). The court noted that the plan at issue did not designate the plaintiff as a beneficiary, and for this reason, the plaintiff was not a "beneficiary" within the meaning of ERISA. Id. at 177. The court stated,

> The claims by a nonparticipant and nonbeneficiary to a plan do not affect the relationship between the traditional ERISA entities. Therefore, such claims are not preempted.

Id. (citations omitted)

Under the Fifth Circuit's holding in Weaver, if this Court determines that Hollis was an independent contractor, and not an employee, then Hollis was not a "participant" or "beneficiary" of the ERISA plan of Graduate Supply, and Hollis's state law claims against Defendants will not be preempted by ERISA. Accordingly, the Court will now address the issue of whether Hollis was an independent contractor, as he urges, or an employee, as urged by Defendants.

3. Was Hollis an independent contractor?

The Court notes that, within the context of the question of whether Hollis was an employee or independent contractor, the parties do not dispute Hollis's job duties as a sales representative or the other circumstances of Hollis's arrangement with Graduate Supply, such as the method in which he was paid or the terms of the 1981 agreement. The Court also notes that the question of whether an individual is an employee or an independent contractor for purposes of ERISA is a question of law. Penn v. Howe-Baker Engineers, Inc., 898

F.2d 1096, 1101 (5th Cir. 1990) (citing Holt v. Winpisinger, 811 F.2d 1532, 1536 (D.C.Cir. 1987)). To determine whether an individual is an employee or an independent contractor, the Court must apply the federal common law of agency, rather than the law of a particular state. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) . The Court must examine and weigh a number of factors in its determination, assessing all of the incidents of the work relationship, with no one factor being decisive. Penn, 898 F.2d at 1102 (citing NLRB v. United Insurance Company of America, 390 U.S. 254, 258, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968)) . There are ten factors listed in the Restatement (Second) of Agency which are helpful in differentiating between an employee and an independent contractor:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular

business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Salameh, .23 F.Supp.2d at 711-12 (citing Restatement (Second) of Agency § 2202 (2) (1958) . In Penn, the Fifth Circuit noted that special emphasis should be placed on the issue of control, and "the right of one party to control not only the result to be achieved by the other, but also the means and manner of performing the task assigned, is the most critical factor in ascertaining whether an employment relationship exists." Penn, 898 F.2d at 1102 (quoting Holt, 811 F.2d at 1539)

In addition, the United States Supreme Court has noted that the following are also factors to consider in determining whether an individual is an independent contractor or employee:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Community For Creative Non-Violence v. Reid, 490 U.S. 730. 109 S.Ct. 2166, 2178-79, 104 L.Ed.2d 811 (1989).

Initially, the Court notes that as of 1981, Hollis's employment agreement stated that he was a "self-employed person." While Defendants are correct that Hollis's designation as a self-employed person in and of itself is not material, other aspects of Hollis's arrangement with Graduate Supply are consistent with self-employment. Hollis was paid by commission. Hollis had to pay his own traveling expenses. He also paid his own self-employment and income taxes. He participated in a Keough Plan as a self-insured person.

With regard to the issue of control over the details of the work, Defendants have set forth no evidence indicating that Hollis did not have control over how he sold the merchandise of Graduate Supply. Hollis decided when he would visit the schools assigned to him, and Hollis was responsible for maintaining the contracts with these schools. Under these circumstances, the Court finds that Hollis was an independent contractor.

Cases addressing the ERISA status of sales representatives have come to similar conclusions. See Dykes v. DePuy, Inc., 140 F.3d 31, 38-39 (1st Cir. 1998) (where sales representative enjoyed broad control over his day-to-day business: set his own hours, decided where and when to make sales calls, was paid on commission basis and received Form 1099s rather than W-2s for federal tax purposes, and, in addition, signed written contract that clearly stated that he was an independent contractor, sales representative was an independent contractor for purposes of ERISA); Speen v. Crown Clothing Corp., 102 F.3d 625, 632-33 (1st Cir. 1996) (clothing salesman was not "employee" entitled to protection of ERISA; salesman decided where he went and how long he worked on any particular day, how and in what order he covered his territory, was not required to carry, do, or say anything in particular as he tried to sell products, and was paid on commission basis) . Because Hollis was an independent contractor, the Court finds that he was not a participant or beneficiary of the ERISA plan of Graduate Supply. Hollis's

claims against Defendants are not preempted by ERISA, and Hollis may pursue his state law claims against Defendants. Defendants' Motion for Partial Summary Judgment on the issue of ERISA preemption is denied as a matter of law.

B. Punitive or Extra Contractual Damages Under Mississippi Law

The Court finds that there are triable issues of material fact regarding whether Defendants had an arguable reason for denying coverage to Plaintiff. For this reason, Defendants' Motion for Partial Summary Judgment on the issue of punitive or extra contractual damages is not well taken and must be denied.

IV. Conclusion

For all of the above reasons, the Motion for Partial Summary Judgment is denied.

IT IS THEREFORE ORDERED that Defendants' Motion for Partial Summary Judgment [48-1] is denied.

SO ORDERED this the 7th day of May, 1999.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

2. **FINAL JUDGMENT OF THE OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF MISSISSIPPI**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J. L. HOLLIS — PLAINTIFF

VERSUS — CAUSE NO. 3:98cv341BN

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY AND THE PAUL REVERE INSURANCE COMPANY — DEFENDANTS

FINAL JUDGMENT

In accordance with the verdict of the jury rendered on May 28, 1999, by Walter Ellington, foreperson, and five other jurors in the amount of $100,000 and the Opinion and Order of the Court of this date granting Plaintiff interest of $3,280, final judgment is hereby rendered in favor of Plaintiff J.L. Hollis against Provident Life and Accident Insurance Company and the Paul Revere Insurance Company in the total amount of $103,280 together with interest at the rate of 4.879% per annum from May 28, 1999, the date of the verdict, until paid in full plus his costs.

SO ORDERED this the 15th of August, 1999.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

3. OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED APRIL 3, 2001, HOLLIS V. PROVIDENT LIFE AND ACCIDENT INS. CO AND PAUL REVERE INS. CO.,

259 F.2D 410 (5TH CIR. 2001).

United States Court of Appeals,
Fifth Circuit.

J.L. HOLLIS, Plaintiff-Appellant-Cross-Appellee,
v.
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendant-Appellee-Cross-Appellant,
and
Paul Revere Insurance Group, Defendant-Appellee.

No. 99-60877.

Aug. 8, 2001.

Before REYNALDO G. GARZA, DAVIS and JONES, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

This case involves claims for denial of benefits under two disability insurance policies. Appellant-cross-appellee Larry Hollis ("Hollis") began work with R.M. Hendrick Graduate Supply House, Inc. ("Graduate Supply") as a salesman in 1970. Graduate Supply sells class rings, diplomas, regalia, graduation invitations, yearbooks, and other similar items to high schools and colleges.

As a Graduate Supply sales representative, Hollis was assigned a territory and was responsible for servicing the schools within

that territory. Hollis would load his car with Graduate Supply products, deliver them to the schools, make a sales presentation to the students, and then reload his car. In addition, Hollis serviced some of Graduate Supply's commercial accounts.

Prior to August 1, 1981, Graduate Supply treated Hollis as an employee, but, on August 1, 1981, Hollis and Graduate Supply signed an agreement that made Hollis an independent contractor. Under the agreement, Hollis was required to pay his own travel expenses, provide his own vehicle, and pay his own employment and income taxes. Hollis determined when he would visit his assigned schools, and he was solely responsible for maintaining Graduate Supply's contracts with those schools. In return, Graduate Supply paid Hollis a commission on the items he sold. However, Graduate Supply was Hollis's primary source of income, he had the same duties as employee-sales representatives, and he shared in year-end bonuses like Graduate Supply's employees.

Additionally, Graduate Supply had a program to provide life, medical, and disability insurance for its employees in which Hollis participated. Pursuant to this program, Hollis procured a disability insurance policy from Provident Life and Accident Insurance Company ("Provident"). Graduate Supply's employee- sales representatives obtained disability policies from a company called Lincoln Life. On his own, Hollis obtained a second disability policy from Paul Revere Insurance Company ("Paul Revere").

Graduate Supply paid $600.00 per year, or $50.00 per month, of the premium of each salesman's policy procured pursuant to its benefit program. If a salesman purchased a policy that cost more than $600.00 per year, Graduate Supply would pay the excess as it became due and then deduct it from the salesperson's monthly compensation. The premiums on Hollis's Provident policy were paid in this fashion.

The Provident policy would pay a monthly benefit of $4,100.00 in case of disability at a cost of $2,020.00 per year. The Paul Revere policy would pay a monthly benefit of $2,100.00 in case of disability. Both policies provide benefits in case of "total disability," but each policy defines that term in a slightly different way. Under the Provident policy, "total disability" means that "due to injury or sickness" the insured is "not able to perform the substantial and material duties of [his] occupation." Under the Paul Revere policy, "total disability" means that "because of injury or sickness," the insured is "unable to perform the important duties of [his] occupation."

Beginning in 1980, Hollis experienced occasional lower back pain and muscle spasms. Between 1980 and 1995, Hollis visited physicians several times for diagnosis and treatment of his back pain. The physicians told him that he did not have a ruptured disk or any other surgical problems. They advised Hollis to stay off his feet for a few days and take pain medication. In May of 1995, Hollis experienced severe back pain and spasms while unloading boxes of merchandise from his vehicle. He again visited a physician, Dr. Lynn Stringer, who performed an MRI on him and diagnosed him with advanced degenerative disc disease. His physician told him that excessive driving, bending, lifting and stooping was the reason for his back pain. Hollis attempted to continue working, but on August 17, 1995 he resigned from Graduate Supply due to his back problems.

On August 23, 1995, Hollis submitted his claim forms to Provident and Paul Revere. *413 Dr. Stringer completed the Attending Physician Statement portion of the form. She reported the diagnosis as advanced degenerative disc disease and explained that the condition was permanent. She advised Hollis to either change his work habits or stop working. Within six months of the filing of the claim, both Provident and Paul Revere began paying benefits to Hollis.

In early 1997, Provident acquired Paul Revere and transferred Hollis's file to a different claim representative, Sally Moore.

Moore contacted Hollis and told him that the typed attending physician's statements he had been submitting must be handwritten. In a telephone conversation, Hollis informed her, "very aggressively" according to Provident and Paul Revere, that he would continue to submit typed forms to save his physician time. Approximately one and one half hours after this telephone conversation, Moore reopened the investigation into Hollis's claim and ordered additional physician statements and surveillance of Hollis's daily activities. Both Provident and Paul Revere terminated his benefits in early 1998 on the ground that he did not have a "total disability" as that term is defined under the policies.

In April of 1998, Hollis filed suit against Provident and Paul Revere in Mississippi state court for breach of contract and bad faith denial of disability insurance benefits. The case was removed to federal district court on May 5, 1998. In the federal district court, Provident moved for summary judgment on Hollis's state law claims on the ground that they were preempted by the federal Employee Retirement Income Security Act ("ERISA"). The district court denied its motion. The case was tried to a jury on May 28, 1998. As to Provident, the jury found that Hollis was totally disabled as defined by the Provident policy and that Provident acted in bad faith in denying Hollis's claim. As to Paul Revere, the

jury found that Hollis was not totally disabled under its policy.

In addition to policy benefits, the jury awarded $100,000 in damages for mental anguish and emotional distress to Hollis for Provident's bad faith denial of disability benefits. Hollis moved the district court to award attorney's fees and costs, but the district court denied the award.

On appeal, Hollis raises two points of error. First, he claims that the district court erred by failing to award attorney's fees and costs. Second, he claims that the jury's answer that he was not totally disabled under the Paul Revere policy must be set

aside because: it cannot be reconciled with the jury's answer that he was totally disabled under the Provident policy, the jury arrived at this answer by impermissibly considering evidence regarding Hollis's preexisting condition, and it is against the great weight of the evidence. Provident raises three points of error by way of cross appeal. First, Provident contends that Hollis's state law claims are preempted by ERISA. Alternatively, Provident argues: 1) there was insufficient evidence to support an award of damages for emotional distress and 2) Hollis's expert witness was not qualified to testify as to whether Provident denied his benefits in bad faith.

I.

The first issue we must decide is whether ERISA preempts Hollis's state law claims against Provident. Provident moved for summary judgment on the ground that ERISA preempts Hollis's state law claims, but the district court denied the motion. We reverse the decision of the district court.

ERISA "shall supersede any and all State laws insofar as they may now or *414 hereafter relate to any employee benefit plan ..." 29 U.S.C. § 1144(a) (1994). More specifically, Section 1144(a) bars state law causes of action when two elements are present: 1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and 2) the claims directly affect the relationship between the traditional ERISA entities-the employer, the plan and its fiduciaries, and the participants and beneficiaries. See Weaver v. Employers Underwriters, Inc., 13 F.3d 172, 176 (5th Cir.1994); Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 245 (5th Cir.1990). Hollis's state law claims concern the right to receive benefits under an ERISA plan, and his claims directly affect the relationship between traditional ERISA entities. Therefore, ERISA preempts his state law claims against Provident.

A. ERISA Plan

[2] The first element of preemption-whether the state law claims address areas of exclusive federal concern, such as the right to receive benefits under an ERISA plan–is met. Clearly, Hollis claims a right to receive benefits under the disability insurance policy Provident issued. However, this fact alone is insufficient to meet the first element of preemption. He must claim a right to receive benefits under an ERISA plan for preemption to occur. See Weaver, 13 F.3d at 176. Hollis concedes that Graduate Supply established and maintained an ERISA plan [FN1]. The issue, therefore, is whether Hollis's disability insurance policy with Provident constitutes part of Graduate Supply's ERISA plan.

FN1. Hollis states in his brief that "[t]he 'plan' did exist as to the employees of Graduate Supply, and Hollis could only have been a plan participant if he had been designated a beneficiary by one of the employees of the plan or by a provision of the plan itself." At oral argument, Hollis's attorney was asked, "[do] you agree it's an ERISA plan?" He responded by stating "I don't disagree with the district court's finding of fact to that effect."

As mentioned above, under the terms of the Graduate Supply plan, a salesman would choose a disability insurance policy, and Graduate Supply would pay $600 per year in premiums on that policy. Hollis chose a disability policy from Provident, and Graduate Supply paid $600 per year in premiums on that policy. Hollis argues that his Provident Policy was not part of Graduate Supply's ERISA plan because he selected Provident as his insurance company, while all the other salesmen selected Lincoln Life. The terms of the Graduate supply plan, however, provided that Graduate Supply would pay $600 regardless of which insurance company was selected. With respect to disability insurance, Graduate Supply treated Hollis the same as it treated any other salesman. Thus, Hollis's Provident policy was part of Graduate Supply's ERISA plan.

B. "Participant" or "Beneficiary"

Although the existence of an ERISA plan is a necessary requirement for preemption, its existence does not necessitate preemption. See Weaver, 13 F.3d at 176. For preemption to occur, the claims must "directly affect the relationship between traditional ERISA entities-the employer, the plan and its fiduciaries, and the participants and beneficiaries." See 29 C.F.R. § 2510.3-3(b) (2001); Memorial Hosp. Sys., 904 F.2d at 245. Because Hollis's claims directly affect the relationship between traditional ERISA entities, the second element of preemption is met.

*415 Claims of breach of duty of good faith, breach of contract, and denial of benefits, like Hollis's claim against Provident, certainly can be preempted by ERISA. See Weaver, 13 F.3d at 177. However, the rule that the claims must "directly affect the relationship between traditional ERISA entities" has a standing component as well. See id. Claims, such as those referenced above, are preempted only when the claimant is a plan "participant" or "beneficiary." See id. Thus, for preemption to occur, Hollis must be either a participant or beneficiary as ERISA defines those terms. Provident does not assert that Hollis is a participant.

[3] Thus, ERISA preempts his claims only if he is a beneficiary. ERISA defines beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). Clearly, Hollis is a person who, by the terms of the Provident policy, a part of Graduate Supply's ERISA plan, "is or may become entitled to a benefit thereunder." Id. He was the beneficiary of the disability insurance policy, he was entitled to receive benefits under that policy in the event of total disability, and he did, in fact, receive benefits from Provident for several months. Therefore, under the definition's plain language, Hollis is a beneficiary.

In spite of the definition, Hollis gives two separate and independent reasons why he is not a beneficiary. First, he

argues that independent contractors, such as himself, cannot be ERISA beneficiaries. Second, he argues that the definition of beneficiary does not include a person whose services resulted in the accrual of the benefit. We are not persuaded by either argument.

Relying on our decision in Weaver, the district court concluded that an independent contractor can not be an ERISA beneficiary. In that case, Weaver, an independent contractor, sued his employer and the insurance carrier obligated to pay benefits under the ERISA benefit plan. See Weaver, 13 F.3d at 173-74. We decided that ERISA did not preempt state law in that case because Weaver was neither a participant nor a beneficiary. See id. at 176. We said that Weaver was not a participant precisely because he was an independent contractor. After all, ERISA defines a participant as "any employee ... who is or may become entitled to a benefit." 29 U.S.C. § 1002(8). However, we gave an entirely different reason why Weaver was not a beneficiary. See id. at 177. Weaver was not a beneficiary because the benefit plan did not designate him as a beneficiary. See id. In other words, Weaver was not a person who could ever become entitled to benefits; thus, he did not meet the definition of beneficiary.

For this particular issue, what we did not say in Weaver is more important than what we said. We did not say that his status as an independent contractor had anything to do with him not being a beneficiary. In fact, implicit in our holding in Weaver is that an independent contractor can be a beneficiary so long as he is a person "who is or may become entitled to a benefit" under the plan. Therefore, Hollis's independent contractor status does not preclude him from being a beneficiary.

[4] Similarly, Weaver's claim that his own services accrued a benefit had nothing to do with our holding that he was not a beneficiary. However, citing a footnote from an opinion of the Fourth Circuit, Hollis argues that a beneficiary under ERISA

includes only "a person other than one whose service resulted in the accrual of the benefits, but who is designated as the recipient of benefits accrued through the service of another." *416Darden v. Nationwide Mutual Ins. Co., 796 F.2d 701, 704 n. 3 (4th Cir.1986)(emphasis added). In other words, Hollis argues that a beneficiary is limited to people such as the worker's spouse and children. Until now, we have not squarely decided this issue. However, the other courts of appeals faced with this issue have decided that beneficiary includes those persons whose services accrued the benefit. We agree with our sister courts.

In Peterson v. American Life and Health Ins. Co., the Ninth Circuit, relying on the plain language of ERISA's definition of beneficiary, held that an ERISA beneficiary includes "any person designated to receive benefits from a policy that is part of an ERISA plan." 48 F.3d 404, 409 (9th Cir.1995). The Peterson court reasoned that "to hold otherwise would create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA." Id. The Peterson court noted that "such a scenario would frustrate Congress's intent of achieving uniformity in the law governing employment benefits." Id.

Other circuits have found the Ninth Circuit's reasoning as persuasive as we do. In Prudential Ins. Co. of America v. Doe, the Eighth Circuit held that the controlling shareholder in a law firm was an ERISA beneficiary because he was "designated to receive benefits under the terms of the 'employee benefit policy'." 76 F.3d 206, 208 (8th Cir.1996). In Wolk v. Unum Life Ins. of America, the Third Circuit held that a partner in a law firm was an ERISA beneficiary because she was designated to receive benefits under an employee welfare benefit plan. 186 F.3d 352, 356 (3d Cir.1999). Finally, in Engelhardt v. Paul Revere Life Ins. Co., the Eleventh Circuit held that a physician-shareholder of a professional corporation was an ERISA beneficiary because he was a beneficiary under the

group disability insurance plan. 139 F.3d 1346, 1351 (11th Cir.1998).

At the end of this analysis, we reach the unremarkable conclusion that ERISA's definition of beneficiary means precisely what it says. A beneficiary is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). Because Hollis was a person designated by the terms of the plan who could become entitled to benefits thereunder, he is an ERISA beneficiary.

Both elements of preemption are satisfied in this case. Hollis's state law claims address areas of exclusive federal concern because he is claiming a right to receive benefits under the terms of an ERISA plan. Because Hollis is an ERISA beneficiary, his claims directly affect the relationship between traditional ERISA entities. Therefore, ERISA preempts Hollis's state law claims against Provident for bad-faith denial of disability benefits.

The judgment against Provident is vacated and the case is remanded to the district court so Hollis's claims against Provident can be concluded as appropriate under ERISA. We leave it to the district court to determine whether Hollis has exhausted his administrative claims against Provident. If not, the district court should remand Hollis's claims against Provident to the plan administrator. If the claims have been administratively exhausted, then the district court should consider whether to allow Hollis to amend his suit to seek review of the administrative findings under the appropriate standard of review. [FN2]

FN2. "This court requires that claimants seeking benefits from an ERISA plan must first exhaust available administrative remedies under the plan before brining suit to recover benefits." Bourgeois v. Pension Plan for Employees of Santa Fe Intl. Corps., 215 F.3d 475, 479 (5th Cir.2000) (citing Denton v.

First Nat'l Bank of Waco, 765 F.2d 1295, 1300 (5th Cir.1985)).

II.

In addition to preemption, Provident raises two more issues by way of cross appeal. Provident argues that there was insufficient evidence to support the award of emotional distress and mental anguish damages and that Hollis's expert was unqualified to testify as to whether Provident denied benefits in bad faith. Since we hold that ERISA preempts Hollis's state law claims against Provident, both of these issues are moot.

III.

Hollis challenges the judgment rendered on the take nothing verdict in favor of Paul Revere. He argues first that the verdict in favor of Paul Revere can not be reconciled with the verdict against Provident. As indicated above, the district court erred in allowing Hollis's claims against Provident to go to the jury, so the jury's verdict on those claims is essentially a nullity. Thus, we are only left with the take nothing verdict in favor of Paul Revere.

Hollis also argues that the jury improperly considered evidence that he had a preexisting condition at the time he applied for the Paul Revere policy. During deliberations, the jury sent a note to Judge Barbour which asked: "Are we allowed to consider good-faith/bad-faith in determining our decision in regards to the written application for a policy." According to Hollis, the note shows that the jury found in favor of Paul Revere because it believed he applied for the policy in bad faith.

Judge Barbour sent a note back to the jury room instructing them that they should not consider evidence of bad faith/good faith in the application process to determine whether Hollis was totally disabled. Juries are presumed to follow the instructions of the court. See Richardson v. Marsh, 481 U.S.

200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Therefore, we must presume that the jury followed Judge Barbour's instructions and ignored the evidence of bad faith in the application process.

Hollis next argues that we should grant a new trial in his action against Paul Revere because the verdict is against the great weight of the evidence. After reviewing the record, we are not persuaded that the verdict in favor of Paul Revere was against the great weight of the evidence.

Hollis claims the district court erred by failing to award him attorney's fees in his action against Provident. Because Hollis's state law claims against Provident are preempted by ERISA, the issue is moot.

IV.

We VACATE the judgment rendered against Provident and REMAND Hollis's action against Provident so it can be handled as an ERISA action. We AFFIRM the take nothing judgment rendered in favor of Paul Revere.

4. ORDER OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 25, 2001, DENYING PETITION FOR REHEARING FILED BY PETITIONER HEREIN

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 99-60877

J.L. HOLLIS

Plaintiff-Appellant-Cross-Appellee

v.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

Defendant-Appellee-Cross-Appellant,

PAUL REVERE INSURANCE GROUP

Defendant-Appellee.

Aug. 8, 2001.

Before REYNALDO G. GARZA, DAVIS and JONES, Circuit Judges.

PER CURIAM:

The petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the

Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT

/S/ Reynaldo G. Garza
United States Circuit Judge